Supreme Court, U.S.
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No. 92-1745

In The

Supreme Court of the United States

October Term, 1992

VERNON R. JANTZ,

Petitioner,

v.

CLEOFAS F. MUCI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Was Respondent Entitled To Qualified Immunity Where Petitioner Failed To Demonstrate That Clearly Established Law In 1988 Prohibited Public School Administrators From Denying Teaching Employment Based Upon Homosexuality?

Was Respondent Entitled To Official Immunity Where Kansas Law Vested The Board Of Education With Final Authority To Hire Teachers And Where The Discretionary Recommendations Of School Principals Were Subject To Review By The Board?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully submits that the decision below properly applied this Court's controlling qualified and official immunity decisions and that the Petition For Writ of Certiorari, presenting no grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in the opinion of the Court of Appeals and in the Petition. However, since

the Petition misstates certain facts, a brief supplemental recitation is necessary.

Petitioner's statement that school principals are given unchecked discretion and the authority to select teachers in Unified School District No. 259 (U.S.D. No. 259) is expressly contrary to the record. The record showed that teaching applications are first reviewed by the District's Office of Secondary School Personnel to determine compliance with state laws on teacher certification and qualifications. App. B at 45, 96. The applications of those meeting state requirements are then referred to the building principals who, applying district-created job qualifications and guidelines, conduct interviews and make recommendations for hire to the Office of Secondary School Personnel. *Id.* at 96.

Following review at this level, the recommendation is then forwarded to the Superintendent and by him to the Board of Education where it is subject to review by the Board. App. A at 35-36. While a rejection of a principal's recommendation is infrequent, it does indeed occur, the District Court acknowledging that the hiring discretion of principals is not "unfettered" and that such recommendations are periodically disapproved. App. B at 96. Final authority to hire teachers is vested in the respective boards of education under Kansas law. App. A at 32, citing Kan. Stat. Ann. § 72-8202c. Respondent's recommendation to hire petitioner's competitor for the teaching job in issue was, as acknowledged by petitioner, reviewed and approved by the Board here. App. A at 36; Pet. at 28.

The District Court did not address the question of where final policymaking authority for the hiring of

teachers resided under state law and did not hold that respondent possessed such final legal authority. Despite finding that the hiring discretion of principals was not unchecked and that their recommendations were subject to review and approval by the Board, the District Court held that school principals possessed final authority *de facto* since their hiring recommendations were given "great weight" and were usually adopted. App. B at 96-97. Concluding that principals possessed neither final legal authority to hire teachers under Kansas law, or final authority in fact, the Court of Appeals held that U.S.D. No. 259 was entitled to official immunity and reversed the judgment. App. A at 32-37. Petitioner's argumentative mischaracterizations of both the qualified and official immunity holdings of the Court of Appeals are addressed in the body of this brief.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION REQUIRING PETITIONER TO DEMONSTRATE THAT CLEARLY ESTABLISHED LAW PROHIBITED SCHOOL ADMINISTRATORS FROM TAKING PERSONNEL ACTIONS BASED UPON A TEACHER'S HOMOSEXUALITY WAS A CORRECT APPLICATION OF *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987) AND PRESENTS NO QUESTION MERITING REVIEW.

The decision challenged here is but a routine application of this Court's established qualified immunity doctrine. Adhering to a flawed qualified immunity analysis rejected by the Court of Appeals, petitioner again seeks to

circumvent respondent's qualified immunity by reliance upon general principles of equal protection law, refusing to address the extant law regarding the "right" of homosexuals to nondiscriminatory public school employment. For understandable reasons, petitioner does not contend that the Tenth Circuit's decision conflicts with the decisions of other circuits regarding qualified or official immunity, or homosexual rights. Rather, the Petition contends that the decision below conflicts with the general equal protection principles set forth in *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), declining to discuss the "contours" of the alleged right in terms of the case specific and fact specific analysis required under established qualified immunity doctrine. This approach is flatly contrary to this Court's controlling decision in *Anderson v. Creighton*, 483 U.S. 635 (1987) and presents no basis for invocation of this Court's discretionary jurisdiction.

Petitioner's case ran aground on the threshold requirement to negate respondent's qualified immunity, a demonstration that the right assertedly violated was protected by clearly established law. As recognized by the Court of Appeals, qualified immunity is based upon "the 'objective reasonableness' of the conduct at issue as compared with the state of the law at the time of the alleged violation." App. A at 12, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this test, liability may not be imposed upon a public official "unless his conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 13. The governing test "provides ample protection to all

but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). See also *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991).

As correctly recognized by the Court of Appeals, this Court's analysis in *Anderson* directly applied to petitioner's attempt to negate the qualified immunity defense. This Court there held that the "clearly established" test requires a plaintiff to demonstrate that the particular conduct in issue was prohibited by clearly established law and may not be satisfied by merely identifying a general right, such as due process, and contending that it was somehow violated by a defendant. 483 U.S., at 639. For if the test of " 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*" and would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability." *Id.* This Court then stated the core requirement for a plaintiff seeking to thwart qualified immunity:

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness

must be apparent." *Id.*, at 640 (Citations omitted).

Applying this test to the specific facts presented, this Court held that the mere fact that the right to be free from unreasonable searches was well-established was not sufficient to negate qualified immunity. Vacating the judgment, the *Anderson* Court held that the plaintiff was required to show that a reasonable public official would have known that the very conduct at issue violated clearly established law under the Fourth Amendment. *Id.*, at 640-41. The Court described this analysis as "fact-specific." *Id.*, at 641.

Although contending below that the refusal to hire petitioner constituted class discrimination against homosexuals, petitioner and his *amici* largely declined to discuss the extant case law regarding differential treatment of homosexuals in public employment, relying instead on general equal protection clause cases without relevance to the situation at hand. Describing the right allegedly violated as the "constitutional right to be free from purely arbitrary and irrational discrimination" by government, petitioner's appellate brief was laden with reference to general equal protection cases regarding architects, commercial fishermen, garbage collectors, and other categories without relevance to the particularized constitutional analysis required. (Brief of Appellee at 10, 15-17). Consistently here, petitioner fails to identify or discuss what cases clearly prohibited a public school administrator from considering homosexuality as a factor in a secondary school teaching position or alternatively, what line of case authority specifically established that homosexuals have a clearly established equal protection right to receipt

of teaching employment in the public schools. Rather than discussing applicable law addressing the "rights" of homosexuals to employment in the public schools, the Petition relies upon equal protection decisions involving religious discrimination or discrimination against the mentally retarded. Pet. at 20-21. Petitioner's general identification of his alleged right and his continued refusal to discuss the applicable law is fundamentally at odds with *Anderson's* admonition that the "contours" of the right be clearly established in order to impose liability. 483 U.S., at 640. In express violation of *Anderson*, all that petitioner has done is to identify a general legal test, rational basis equal protection, and allege that it was somehow violated by respondent.

The reason for petitioner's generic exercise is readily apparent. There was no clearly established law in 1988, nor is there even today, providing homosexuals an equal right to teaching employment in the public schools or barring school administrators under the equal protection clause from considering an applicant's homosexual status in the hiring process. To the contrary, the lower courts have repeatedly held that homosexual status or conduct legitimately stands as a disqualification from employment in the public schools. An established line of cases held that discharge of a public school teacher for homosexual conduct was not invidiously discriminatory. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); *National Gay Task Force v. Board of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985). *See also Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984); *Naragon*

v. Wharton, 737 F.2d 1403 (5th Cir. 1984). Of greater significance is the fact that a teacher's discharge based upon her lesbian sexual status was specifically upheld by the Sixth Circuit against a contention that such action violated the equal protection rights of those with a homosexual orientation. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). Examining the case law as it existed in 1988, the Court of Appeals here correctly observed that there was no "clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation." App. A at 23.

As further observed by the Tenth Circuit, Justice Brennan's dissent from denial of certiorari in *Rowland* is particularly relevant to the qualified immunity inquiry here. Characterizing the state of the law in 1985, Justice Brennan noted that "[w]hether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left lower courts in some disarray." *Rowland*, 470 U.S., at 1015-16. Defining the question presented as whether "a State [may] dismiss a public employee based on her bisexual status alone", Justice Brennan observed that this issue "continues to puzzle lower courts" and characterized the law as "unsettled." *Id.*, at 1009, 1011 and 1018. Although several post-*Rowland* decisions have added to the strength of respondent's position, no subsequent cases were decided prior to the alleged conduct here that "established" the law in petitioner's favor in any manner. Confusion in the

law is the antithesis of a clearly established constitutional right and cannot provide the basis for piercing a defendant's qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) [Qualified immunity must be found where the question was "open" at the time of defendant's actions]. See also *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992) [Qualified immunity obtains where the law is "unsettled."]; *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ["[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."].[1]

Moreover, petitioner's asserted violation of constitutional rights ignores this Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick*, this Court addressed the constitutionality of Georgia's sodomy statute challenged as violating a fundamental right of homosexuals to sexual privacy under the Fourteenth Amendment. Observing that sexual conduct by homosexuals had historically been condemned by law and society, the Court succinctly rejected the argument that the espoused right was fundamental or deserving of any protection. Rejecting the argument that the law was without rational basis, the Court held that "the presumed

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[1] Respondent believes that the established law clearly supports his position. However, the most that petitioner can show, accepting Justice Brennan's assertion, is that some "confusion" exists in the law concerning the public employment rights of homosexuals. Since the controlling issue here is respondent's qualified immunity, such "confusion," if it exists, is of no benefit to petitioner nor a basis for review upon certiorari.

belief of a majority of the electorate in Georgia that homosexual sodomy is immoral" was more than adequate to justify a statute criminalizing the conduct by which the class of homosexuals is defined. *Id.*, at 196. Characterizing *Hardwick*, Justice Scalia has observed that "[m]oral opposition to homosexuality . . . provided [the] rational basis" for the decision. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Scalia, J., concurring). Contrary to petitioner's complaint, school administrators entrusted with the solemn task of caring for the Nation's school children are justified under rational basis review in denying teaching employment to homosexuals based upon the very considerations of morality and public policy identified in *Hardwick* and other decisions extant in 1988.

As properly recognized by the Court of Appeals, petitioner's attempt to confine *Hardwick* as a decision solely applicable to substantive due process analysis ignores the obvious doctrinal implications of the decision. Following its announcement, the Courts of Appeals have noted the decision's negative impact upon equal protection rights of homosexuals. *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ["After *Hardwick* it cannot be asserted that discrimination against homosexuals is constitutionally infirm."], *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ["If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class

criminal."].[2] See also *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). As cogently observed by the Tenth Circuit panel, the precise scope of *Hardwick* need not be determined for qualified immunity purposes here. App. A at 29-30. It is sufficient that the decision and extant appellate holdings demonstrate that respondent's action was not prohibited by clearly established law.[3]

With bare mention of the burden imposed upon him by *Anderson*, petitioner complains that the Court of Appeals, by requiring a showing that discrimination against homosexual job applicants was clearly prohibited, applied an overly constrained application of *Anderson's* particularity test. This is nothing less than an acknowledgement by petitioner that there was no clearly established law condemning adverse public personnel actions

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[2] Homosexual sodomy is a criminal offense under Kansas law. Kan. Stat. Ann. § 21-3505.

[3] Petitioner's implicit recognition of the shadow cast by *Hardwick* upon his equal protection claim reveals the futility of his argument against qualified immunity. In this regard, petitioner observes that "[t]he decision in *Bowers v. Hardwick*, supra, does not preclude *a finding* that forms of homosexual intimacy not proscribed by sodomy statutes should be subject to the equal protection clause." Pet. at 26 (Emphasis added). But, whatever this Court may *in the future find* regarding the effect of *Hardwick* upon the equal protection rights of homosexuals, such holding could not be retroactively applied to determine respondent's entitlement to qualified immunity in 1988. Petitioner's mere desire for a judicially defined protected status in the future does not translate into an existing well-established constitutional right. Irrespective of *Hardwick*, petitioner had the burden to show that respondent's alleged action was prohibited by clearly established law, a burden he did not carry. *Anderson*, 483 U.S., at 639-40.

against homosexuals as invidiously discriminatory. *Anderson* clearly requires a "fact-specific" inquiry so that a reasonable public official would understand that what he is doing violates that "particularized" right. 483 U.S., at 640-41. Consistent with other circuits, the Court of Appeals' opinion appropriately required a close correspondence between the "clearly established law" and the conduct of a defendant before qualified immunity would be negated. See, e.g., *Pounds v. Griepenstroh*, 970 F.2d 338, 342 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1256 (1993); *Pritchett v. Alford*, 973 F.2d, at 312. While *Anderson* does not invariably require cases addressing the very action in question, 483 U.S., at 640, where closely analogous cases exist, as here, they cannot be ignored in determining the "objective legal reasonableness" of an official's conduct. A public official cannot be found to have violated clearly established law where the most analogous decisions fully support his actions. Petitioner's continued refusal to address *Rowland* and like cases,[4] or to even attempt to demonstrate an established line of authority prohibiting adverse personnel actions against homosexuals, speaks volumes for his claim to a clearly established constitutional right.

At bottom, petitioner's case fails for the most basic of reasons, his threshold failure to demonstrate the existence of a clearly established constitutional right prohibiting the conduct of which he complains. The right which petitioner *seeks to establish*, an unqualified right of homosexuals to equal access to public employment, does not

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[4] The Petition does not even mention *Rowland* nor Justice Brennan's comments upon denial of certiorari.

exist even today. Petitioner *assumes* that adverse personnel actions against homosexuals are without rational basis in the face of established authority holding that such actions are not invidiously discriminatory under the equal protection clause. Thus, not only has he "failed to allege the violation of a constitutional right that was clearly established at the time of [respondent's] actions, . . . he failed to establish the violation of any constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991). Where the most analogous and controlling case law supports the civil rights defendant and where a plaintiff has not attempted to identify any law conferring him constitutional protection under the particular circumstances presented, it is clear that the unlawfulness of respondent's conduct was not "apparent" in light of preexisting law and that qualified immunity fully obtains.

The Petition seeks certiorari review upon a question which it characterizes as "novel." Pet. at 34-35. Such an acknowledgment is antithetical to the standards governing exercise of this Court's certiorari jurisdiction. The Petition points to no divergence of opinion in the lower courts regarding the question of substantive equal protection rights for homosexuals to public employment nor to any split in the Courts of Appeals on the test governing qualified immunity. *Anderson*'s qualified immunity test has been applied on hundreds of occasions since its pronouncement, and the decision here, though involving a background of current social interest, is but a routine application of that test. The Court of Appeals' decision was an eminently correct application of the controlling law and presenting no basis for review, the Petition For Writ of Certiorari should be denied.

II. THE COURT OF APPEALS' DECISION FINDING THAT RESPONDENT WAS ENTITLED TO OFFICIAL IMMUNITY SINCE RESPONDENT DID NOT POSSESS FINAL LEGAL OR DE FACTO AUTHORITY TO HIRE TEACHERS WAS A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS AND PRESENTS NO QUESTION MERITING REVIEW.

The opinion below represents an unquestionably correct application of this Court's official immunity jurisprudence. Reviewing Kansas law, the Court of Appeals held that final authority to hire teachers was vested in the school boards and that school principals were not final policymakers under state law. App. A at 32-33. Reviewing the record, the Court rejected petitioner's argument that principals exercised final hiring authority *de facto*, finding that the undisputed record showed that principals' hiring recommendations were subject to review by the Board of Education and indeed were reversed on occasion by the Board. *Id.* at 34-36. The Court's conclusion that respondent did not possess final *de jure* or *de facto* authority to hire teachers was correct and presents no question meriting review.

The Court below appropriately commenced its analysis by observing that "[s]ection 1983 liability for the single act of an employee may not be imposed on a local government entity under a *respondeat superior* theory" but could be imposed "only if the employee possesses 'final authority' under state law to establish policy with respect to the challenged action." *Id.* at 31, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 736-38

(1989); *City of St. Louis v. Praprotnick*, 485 U.S. 112, 127 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-84 (1986). The act for which liability is sought to be imposed must be one that "the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S., at 480. Performing the required state law analysis, the Tenth Circuit held that "final hiring authority in the Kansas school system rests in the school boards" and that "school boards had no statutory authority to delegate hiring authority to subordinates." App. A at 32-33. For this conclusion, the Court relied upon its prior decision in *Ware v. Unified School Dist. No. 492*, 902 F.2d 815, 818 (10th Cir. 1990), citing Kan. Stat. Ann. § 72-8202c (1985) and *Hobart v. Board of Educ. of Unified School Dist. No. 309*, 230 Kan. 375, 634 P.2d 1088, 1094 (1981). *Id.* Petitioner acknowledges the verity of the Court's conclusion that school principals do not possess final hiring authority under state law. Pet. at 11, 28.

Unable to show that principals possess final hiring authority under state law, petitioner instead erroneously contends that the Board delegated its legal hiring authority to respondent in an attempt to connect the Board to the allegedly improper decision. Under petitioner's theory, the failure of the Board to reinvestigate the discretionary decisions of the principal in the hiring process would always constitute delegation, rendering the entity liable. The problems with this approach, as correctly noted by the Court of Appeals, are that it is squarely counter to the controlling precepts established by this Court and is refuted by the record.

At least since *Praprotnik*, it has been well established that "[s]imply going along with discretionary decisions

made by one's subordinates, . . . , is not a delegation to them of the authority to make policy." 485 U.S., at 130. Moreover, "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where," as here, "the wrongfulness of the subordinate's decision arises from . . . [an] unstated rationale." *Id.* Petitioner's argument is also expressly contrary to *Pembaur* where the Court addressed a closely analogous immunity claim:

> "[I]f county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board." 475 U.S., at 483 n.12.

Accordingly, the Board's concurrence here in the discretionary hiring recommendation of respondent to hire petitioner's competitor and its failure to reinvestigate the basis for the recommendation did not constitute a delegation of official policymaking authority.

Moreover, as noted by the Court of Appeals, petitioner's argument that principals possessed unfettered *de facto* hiring authority is negated by the record. The undisputed record showed that principals' hiring recommendations were subject to review and were reviewed in fact by the Office of Secondary Personnel, the Superintendent, and the Board, and were periodically reversed. App. A at 34-36; App. B at 96-97. After review of the record, the

District Court found that applicants for a job must "meet district-created job qualifications" and that "[t]he principal's discretion in hiring is not unfettered." App. B at 96. These findings are unchallenged here and directly negate petitioner's delegation argument. Equally significant is petitioner's acknowledgment that the recommendation here was subject to review by the Board and that the decision to hire could only be made by the Board. Pet. at 11, 28.

Applying the controlling precedents of this Court, the Court of Appeals held that respondent did not possess final hiring authority in law or in fact.[5] These conclusions are clearly correct and the decision below presents no basis for review by this Court. The Petition should be denied.

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[5] In *Adkins v. Board of Educ. of Magoffin County, Ky*, 982 F.2d 952 (6th Cir. 1993), the Sixth Circuit considered very similar facts and issues in holding that the Board of Education and not the superintendent had final policymaking authority under Kentucky law to hire and fire teachers. The Court there found that although the superintendent had the "discretionary authority to make personnel recommendations", such recommendations were subject to review by the Board which possessed final authority under state law. The Court held that the failure of the Board to investigate the superintendent's recommendations did not render the latter a final policymaker. 982 F.2d, at 958-59. These closely similar applications of this Court's precedents demonstrate that no question is presented here meriting review.

III. THE QUESTION OF WHETHER HEIGHTENED SCRUTINY APPLIES TO PERSONNEL ACTIONS INVOLVING HOMOSEXUALS IS NOT PRESENTED BY THIS CASE.

The question of whether classifications affecting homosexuals are subject to heightened scrutiny is not presented by this case. The District Court's decision that homosexual classifications were subject to heightened scrutiny not only broke new ground, but was expressly contrary to the controlling law in its own Circuit. App. A at 8-9, 28. The Court of Appeals appropriately found it unnecessary to reach this issue since, as a matter of law and fact, it was clear that respondent was not a final policymaker in the hiring of teachers. *Id.* at 28. Similarly here, there is no reason for addressing this issue upon certiorari in view of the record and the posture of the case. The Petition alludes to no defined split in the Circuits on this issue, and petitioner's bare desire to have this Court opine on the issue presents no basis for review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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